

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-2130

To be argued by:
STEVEN W. FISHER

**United States Court of Appeals
For the Second Circuit**

ROBERT BROWN,

Petitioner-Appellant,

-against-

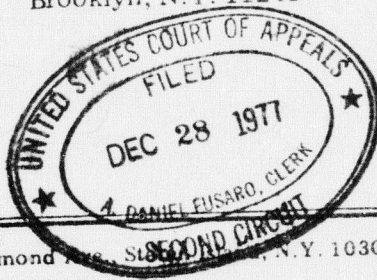
MELVYN TANENBAUM, a Judge of the County Court of the
State of New York, Suffolk County, HENRY O'BRIEN,
District Attorney of Suffolk County, BENJAMIN WARD,
Commissioner of Corrections of the State of New York, and the
SHERIFF OF THE COUNTY OF SUFFOLK,

Respondents-Appellees.

REPLY BRIEF FOR PETITIONER-APPELLANT

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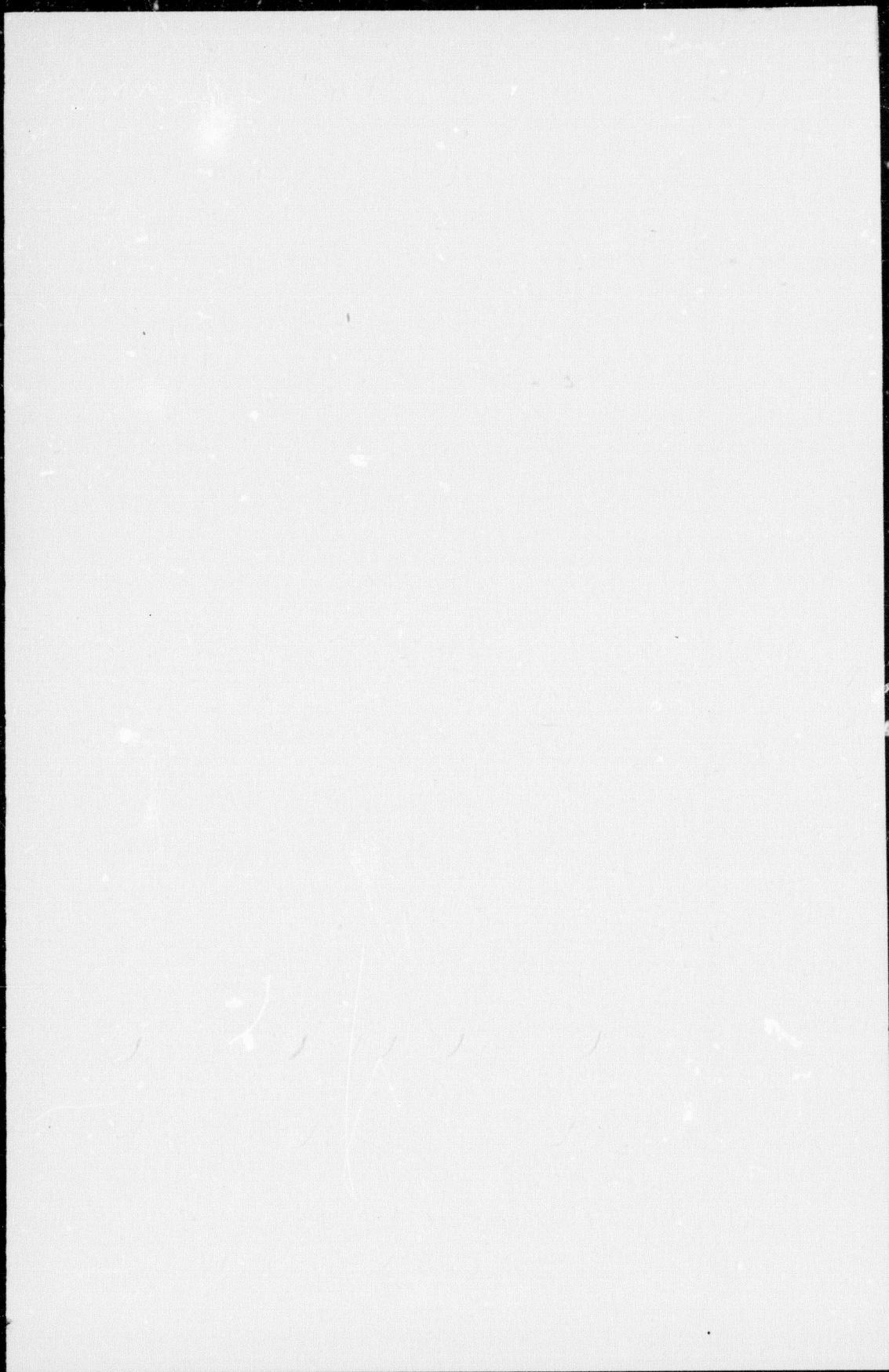


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United States Court of Appeals For the Second Circuit

Docket No. 77-2130

ROBERT BROWN,
Petitioner-Appellant,

-against-

MELVYN TANENBAUM, a Judge of the County Court of the State of New York, Suffolk County, **HENRY O'BRIEN,** District Attorney of Suffolk County, **BENJAMIN WARD,** Commissioner of Corrections of the State of New York, and the **SHERIFF OF THE COUNTY OF SUFFOLK,**

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REPLY BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This is a reply to the brief of the District Attorney of Suffolk County submitted on behalf of the respondent-appellees.

At the outset, an error appearing in petitioner's initial brief must be acknowledged and corrected. The petitioner asserted that Judge Gates' examination of the magazines in question, conducted immediately before the

issuance of the search warrant, was the only judicial scrutiny ever given the magazines prior to petitioner's conviction for their sale. This assertion was inaccurate and was due simply to counsel's inadvertence.

As the District Attorney quite correctly points out, in October, 1975, some three years and seven months after the warrant was issued, the County Court agreed to treat petitioner's motion for a hearing on the issue of obscenity as a motion to inspect the grand jury evidence. (S.A. 38-41)* Judge Tanenbaum invited and received argument on the issue of obscenity, examined the material *in camera*, and ultimately ruled that the evidence presented to the grand jury was legally sufficient to sustain the indictment. (S.A. 42-82)** This action by the County Court, however, has no effect whatsoever on petitioner's position on this appeal.

Although the petitioner would argue that the proceeding before Judge Tanenbaum was not of the sort envisioned in *Heller v. New York*, (413 U.S. 483 [1973])—it most certainly was not prompt—the question of whether it in fact complied with the *Heller* requirements is quite beside the point. Contrary to the apparent impression of the District Attorney, it is not now, nor has it ever been, the petitioner's contention that he is entitled to a writ of habeas corpus, or even to access to the federal courts, simply because he was not afforded a prompt adversarial hearing on the obscenity question. The petitioner maintains only that he is entitled to the issuance of the writ because his conviction rests upon a sale of constitutionally protected material, and that this Court may so hold because the issue

* Numbers cited in parentheses preceded by "S.A." refer to pages in the Joint Supplementary Appendix. Those preceded by "Br." refer to pages in the brief of the District Attorney.

* * Although petitioner's request for an adversarial hearing followed *Heller v. New York*, (413 U.S. 483 [1973]) by more than two years, the District Attorney nevertheless interposed a strong objection to the application. (S.A. 38-39)

has been preserved for its review by operation of law and by express reservation of the court of conviction.*

In any event, it seems plain that the District Attorney has misconstrued some of the petitioner's arguments, and has offered responses which are both inaccurate and misleading. his brief therefore demands reply.

POINT I

THE DISTRICT ATTORNEY HAS FAILED TO REFUTE THE PETITIONER'S CONTENTION THAT THE ISSUE OF THE OBSCENITY VEL NON OF THE MAGAZINES HAS BEEN PRESERVED FOR FEDERAL COLLATERAL REVIEW

As simply a backdrop to the issue of reviewability, the petitioner observed in his initial brief that a guilty plea in an obscenity case lacks the force and effect of an ordinary plea in that it does not necessarily establish a sufficient basis for the State's imposition of punishment. Cf. *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). This, he argued, was because obscenity itself is a question of constitutional law rather than of fact. See, e.g., *United States v. A 35 M.M. Motion Picture Film Entitled "Language of Love,"* 432 F. 2d 705, 711 (2nd Cir. 1970) cert. denied 403 U.S. 925 (holding a jury verdict on obscenity to be merely advisory).

The District Attorney takes issue, answering that "the petitioner's specific acknowledgement of the obscenity of the books in question, one of [the] *elements* of the crime charged and part of the factual averments of the count he

* The petitioner, of course, does not retreat in any way from his other argument, viz. that the statute under which he was convicted, as applied to him, was unconstitutional.

pleaded to, . . . must be deemed a valid and proper determination of the obscenity *vel non* of materials." (Br. at 11) This "acknowledgement", as the District Attorney correctly notes, consisted essentially of petitioner's statements during allocution that, although he did not know or believe at the time he sold the magazines that they were obscene, he had come to understand that they were. (See, S.A. 100-103, 106).

The District Attorney's heavy reliance on this "acknowledgement" seems inappropriate. If, as he is quick to point out, (see Br. at 9n.), "an accused's contemporaneous belief that the materials he is selling are not obscene [does not negate an] element of the offense", it is strangely unconvincing to argue that an accused's expression of a contrary belief irretrievably establishes the same element. The District Attorney's general contention, therefore, that the petitioner's "acknowledgement" offered at his plea allocution should forever foreclose all further review is wholly unpersuasive.

Moving to more specific points, the District Attorney renews his argument that Judge Lundberg's order could not have given rise to a legitimate expectation on the part of any competently counselled defendant that further judicial review would not be foreclosed by a guilty plea. The District Attorney argues that to accept the petitioner's contention that he had the right to interpret the order as preserving the issue of obscenity would be to "obviate the necessity of legal representation for an accused." (Br. at 23)

This position is refuted in the District Attorney's own brief, for he has not yet resolved for himself which of two interpretations of the order, each plainly at odds with its unambiguous language, should be deemed correct. He asserts that "[i]n one sense the trial court's statement can be readily harmonized with the established general rule . . . [concerning] a *potential* right to appellate review . . .

[while a]lternatively, in a literal sense Judge Lundberg's decision is incorrect and . . . constituted a clear misstatement of the applicable law . . ." (Br. at 21)

Judge Lundberg addressed petitioner's fears of non-reviewability directly by giving him an unequivocal assurance that the adverse determination could be appealed even after a plea of guilty. The District Attorney offered no different understanding. It is respectfully submitted that the petitioner was entitled to rely on the unambiguous language of the court before which he stood, and that trial counsel bore no obligation to offer to him the tortured analysis that the District Attorney presents to this Court.*

The District Attorney next attempts to discount as misplaced the petitioner's reliance on *People v. Schifter*, (34 App. Div. 2d 561, 309 N.Y.S. 2d 656 [2nd Dept 1970]). He contends that in view of CPL § 210.30(6), *Schifter* may no longer be deemed controlling. (See, Br. at 23-24).

That statute sought to foreclose appellate review of the sufficiency of grand jury evidence after the State had gone through the long and expensive process of establishing a defendant's guilt at a full blown trial. It was aimed at avoiding the much criticized result reached in cases like *People v. Nitzberg*, 289 N.Y. 523, 47 N.E. 2d 37 (1943). The statute therefore provided that:

The validity of an order denying any motion [to dismiss an indictment on the grounds of insufficiency of grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon *legally*

* The District Attorney asserts that the petitioner in fact placed no reliance on Judge Lundberg's assurance of reviewability until the proceeding below was instituted, some twenty months after the plea. (See, Br. at 22) This contention is belied by the fact that petitioner felt free to, and in fact did, raise the obscenity *vel non* issue on direct appeal from the judgment.

sufficient trial evidence. CPL §210.30(6)
(McKinney's 1970) (emphasis supplied)

Schifter demonstrates that appellate review of grand jury evidence was available in New York prior to the advent of the statute. Nothing in the language of the provision, or in the policy underlying its enactment, implies that the same right is not available today.

Finally, the petitioner's argument that the obscenity issue has survived his guilty plea by operation of law, and that Judge Lundberg simply recognized that fact, is dismissed by the District Attorney as lacking "even surface conceptual plausability". (Br. at 24) Frankly, the argument seems so compelling to the petitioner that he can account for this response on no grounds other than his own failure to present his position with sufficient clarity. The following step-by-step analysis is therefore offered in an attempt to remedy that failure:

1. In New York, the only property subject to seizure pursuant to a search warrant is contraband or evidence or instrumentalities of a crime. (See, CPL §690.10.)

2. A search warrant which authorizes the seizure of property which does not fall within one of the above-described categories is therefore defective.

3. Property seized pursuant to a defective warrant is obtained by means of an unlawful search and seizure.

4. Property obtained by means of a seizure which was unlawful for whatever reason may be suppressed or excluded upon the motion of the accused. (CPL §710.20[1].) No limitation to Fourth Amendment violations appears in the statute.

5. The denial of such a motion is preserved for appellate review by statute even where the accused is eventually convicted upon his plea of guilty. (CPL §710.70[2].)

6. An issue so preserved is likewise preserved for federal habeas corpus review (see *Lefkowitz v. Newsome*, 420 U.S. 383 [1975]) unless it arises solely under the exclusionary rule of the Fourth Amendment. (*Stone v. Powell*, 428 U.S. 465 [1976].)

In the case at bar, Judge Gates made an *ex parte* determination that the magazines in question were obscene, and hence were contraband and evidence of a crime. He therefore issued a warrant authorizing their seizure. If, as petitioner contends, as a matter of law the magazines were not obscene, they were neither contraband nor evidence of a crime and the warrant was defective. If the warrant was defective, the magazines were obtained by means of an unlawful seizure and were subject to suppression upon the petitioner's motion. The petitioner appropriately moved to controvert the warrant and suppress the evidence, *inter alia* on the ground that "there was no basis in fact or in law to declare the seized merchandise as 'obscene'." (S.A. 1) The motion was denied and the denial survived petitioner's guilty plea by operation of law. The obscenity issue was therefore presented to the Appellate Division on direct appeal from the judgment.*

* Judge Lundberg based his decision on the prior finding of Judge Gates. Recognizing that the Gates ruling would be subject to appellate review notwithstanding a guilty plea, Judge Lundberg simply affirmed that the underlying merit of his own decision would likewise be subject to the same appellate review.

It is of some further interest to note that when Judge Tanenbaum later announced his decision that the evidence before the grand jury was sufficient to sustain the indictment, he was asked by counsel "to attach to the record, in the event an appeal is necessary, as a sealed exhibit, the minutes of the instructions given to the Grand Jury. I think we're entitled to that to appear in the record." Significantly, the judge replied: "I think that will happen as a matter of law anyway. If that becomes an issue the Appellate Division will call for the minutes, I'm sure." Counsel then announced, "Let me just state for the record, in the event of a conviction, that will be an issue. So that the integrity of the minutes should be preserved." The prosecutor chose to make no comment at all. (S.A. 82-83)

Finally, there seems to be no disagreement about the fact that the obscenity *vel non* issue bears no relationship to the policy considerations underlying the Fourth Amendment's exclusionary rule. (See, Br. at 25) Hence, federal habeas corpus review of the issue must be available to the petitioner.

In sum, the arguments advanced by the District Attorney have failed to persuade the petitioner, and should fail to persuade this Court, that the constitutional issue of the obscenity *vel non* of the magazines in question is beyond the Court's review.

POINT II

THE PETITIONER RENEWS HIS CONTENTION THAT AS A MATTER OF CONSTITUTIONAL LAW THE MAGAZINES UPON WHICH HIS CONVICTION IS BASED ARE NOT OBSCENE

It is of course true that this Court's determination of the merits of the obscenity *vel non* issue will turn upon its own examination of the magazines in question. The petitioner welcomes such scrutiny and is confident that this Court will ultimately conclude that the magazines are not obscene if for no other reason than that they are not utterly without redeeming social value.

In response to the District Attorney's contentions, the petitioner would note once again that the magazines contain textual material which relates to the activities depicted in the accompanying photographs and which must be judged as having some social value—more is simply not required. This is not an instance in which pornography is sought to be rescued by the "inclusion of a few verses from the Psalms" (*United States v. A Motion Picture Film Entitled "I Am Curious-Yellow"*, 404 F. 2d

196, 201 [2nd Cir. 1968] [Friendly, J. concurring]). Rather, the instructional and informational value of the magazines, especially "*The Art of Cunnilingus*," is both real and of social value. See, e.g. *United States v. A 35MM Motion Picture Film Entitled "Language Of Love"*, 432 F.2d 705 (2nd Cir. 1970) cert. denied 403 U.S. 925.

In pleading guilty, the defendant admitted that he had accepted orders for the two magazines in question and had shipped them to storekeepers for resale. (See, e.g., S.A. 98.) Absent any charge or showing of pandering (c.f. *Ginzberg v. United States*, 383 U.S. 463 [1966]), and absent "any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it," (*Redrup v. New York*, 386 U.S. 767, 769 [1967]), the magazines here in question, simply cannot be held to be obscene.

POINT III

THE PETITIONER RENEWS HIS CONTENTION THAT THE STATUTE UNDER WHICH HE WAS CONVICTED AS CONSTRUED PRIOR TO THE COMMISSION OF THE ACTS CHARGED FAILED TO AFFORD HIM ADEQUATE NOTICE THAT THE MATTER CONTAINED IN THE MAGAZINES WAS PROSCRIBED.

This Court has been presented with vigorous arguments both attacking and supporting the constitutionality of New York's former obscenity statute as applied to the petitioner's acts. The petitioner respectfully submits that these arguments demonstrate that in New York, prior to the commission of the acts with which he was charged, obscenity was judged under a standard—the so-

called hard-core pornography test—which looked primarily to the setting and the manner in which the acts were portrayed. Determinations were then made on an *ad hoc* basis, with courts judging particular pieces of material by reference to the hard-core standard.

In essence then it is the petitioner's position that the statute at issue, as construed under that hard-core test, did not give him adequate notice that the two magazines in question were proscribed. It simply cannot be said that depictions of the now familiar and widely indulged in sexual practices of fellatio and cunnilingus, when presented with related, instructive and informative text, would be known and understood by the petitioner to be the sort of material that "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre . . . [or is] [r]ecognizable 'by the insult it offers, invariably, to sex and to the human spirit' . . . [or depicts] dirt for dirt's sake . . . [or] is the vile rather than the coarse, the blow to sense, not merely to sensibility . . . [or] smacks, at times, of fantasy and unreality, of sexual perversion and sickness."*

* *People v. Richmond County News*, 9 N.Y. 2d 578, 587, 175 N.E. 2d 681, 216 N.Y.S. 2d 369 (1961).

CONCLUSION

For all the foregoing reasons, the decision and order from which this appeal is taken should be reversed, and a writ of habeas corpus should issue.

Dated: Brooklyn, New York
December 28, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 28 day of Dec. 1977 deponent served the within Brief upon

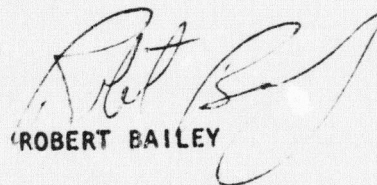
Hon. Henry F. O'Brien, D.A., Suffolk Co.

attorney(s) for
Appellee

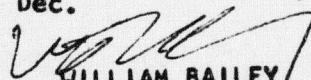
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ROBERT BAILEY

Sworn to before me, this 28 day
of Dec. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

